

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY

RELATORS/COUNTER-DEFENDANTS

v.

CASE NO. 1:06cv433-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT/COUNTER-PLAINTIFF

and

FORENSIC ANALYSIS ENGINEERING CORPORATION;
HAAG ENGINEERING CO.; and ALEXIS KING

DEFENDANTS

**STATE FARM FIRE AND CASUALTY COMPANY
AND NON-PARTY WITNESS MARK DRAIN'S
JOINT MOTION TO QUASH [509] DEPOSITION SUBPOENA
TO KENNETH MARK DRAIN AND FOR A PROTECTIVE ORDER**

Defendant/Counter-Plaintiff State Farm Fire and Casualty Company ("State Farm") and Non-party witness Mark Drain, respectfully submit this Joint Motion to Quash [509] Deposition Subpoena and for Protective Order (With Verified Good Faith Certificate).¹ Movants would show:

1. Mark Drain, a resident of San Angelo, Texas, is Team Manager in State Farm's Catastrophe Services. (Drain Decl. at ¶¶1-2, Ex. 19 to Mtn.) During Hurricane Katrina, Drain also served a Team Manager in Catastrophe Services, with a primary office in Gulfport, Mississippi. (Drain Decl. at ¶2, Ex. 19 to Mtn.) Importantly to the instant motion, Drain had *no* involvement whatsoever, either direct or managerial, with the McIntosh flood claim or homeowners' claim. (Drain Decl. at ¶3, Ex. 19 to Mtn.) Indeed, his name appears nowhere in the activity logs for either the McIntosh flood claim or for the McIntosh homeowners' claim.

¹ The Rigsbys' counsel – in what is unfortunately becoming a pattern – refused to execute and return the Good Faith Certificate tendered them by the undersigned. Accordingly, State Farm and Drain are filing their motion accompanied by a Verified Good Faith Certificate. (Verified Good Faith Cert. at ¶2 & Ex. 1, Ex. 1 to Mtn.)

2. Moreover, the Rigsbys did **not** identify Drain as a person with knowledge of “discoverable information regarding some or all of the claims alleged by Relators in this Action and/or potential defenses” in their response to State Farm interrogatory No. 13, nor was he identified as such in the Rigsbys’ Initial Disclosures. (1-11-2010 Rigsbys’ Disc. Resp. & 11-13-2009 Rigsby Discl., Exs. 20-21 to Mtn.) Likewise, State Farm has not identified him as a person with discoverable knowledge in its Initial Disclosures or Interrogatory responses. (Exs. 22-23.)

3. Further, he has previously been deposed in excess of ten times in Hurricane Katrina-related litigation, including:

11-03-2006 Dep. of Mark Drain (123 pages) in *Guice v. State Farm Fire & Casualty Co.*, No. 1:06cv1-TLS-RHW (S.D. Miss.);

12-18-2006 Dep. of Mark Drain (295 pages) in *Roper v. State Farm Fire & Casualty Co.*, No. 1:06cv713-BAF (S.D. Miss.) (Vol. 1);

02-09-2007 Dep. of Mark Drain (102 pages) in *Eagan v. State Farm Fire & Casualty Co.*, No. 1:06cv704-LTS-RHW (S.D. Miss.);

02-16-2007 Dep. of Mark Drain (28 pages) in *McCoy v. State Farm Fire & Casualty Co.*, No. 1:06cv00004-LTS-RHW (S.D. Miss.);

02-21-2007 Dep. of Mark Drain (182 pages) in *Roper v. State Farm Fire & Casualty Co.*, No. 1:06cv713-BAF (S.D. Miss.) (Vol. 2);

02-23-2007 Dep. of Mark Drain (164 pages) in *Fowler v. State Farm Fire & Casualty Co.*, No. 1:06cv489-TLS-RHW (S.D. Miss.);

06-22-2007 Dep. of Mark Drain (150 pages) in *Aicklen v. State Farm Fire & Casualty Co.*, No. 1:06cv1233-LTS-RHW (S.D. Miss.), and multiple other cases captioned in the transcript;

09-21-2007 Dep. of Mark Drain (55 pages) in *Waterman v. State Farm Fire & Casualty Co.*, No. 1:06cv871-LTS-RHW (S.D. Miss.);

04-28-2008 Dep. of Mark Drain (66 pages) in *Gagne v. State Farm Fire & Casualty Co.*, No. 1:06cv0711-LTS-RHW (S.D. Miss.); and

10-16-2008 Dep. of Mark Drain (181 pages) in *Payment v. State Farm Fire & Casualty Co.*, No. 1:07cv1003-LTS-RHW (S.D. Miss.).

4. Despite the fact that State Farm has produced all **1346** pages of this testimony – plus exhibits – to the Rigsbys in this Action,² the Rigsbys have issued a [509] subpoena³ and [510] notice for his deposition, unilaterally setting it for June 21, 2010. (*Id.*)

5. For the reasons explained in State Farm's concomitant memorandum of authorities, which is incorporated herein by reference, that subpoena should be quashed and a protective order issued against the Rigsbys taking Drain's deposition.

WHEREFORE, PREMISES CONSIDERED, State Farm and Drain respectfully request that the [509] deposition subpoena to Drain be quashed and that a protective order issue preventing the Rigsbys from taking his deposition in this Action. State Farm and Drain seeks such further, supplemental and alternative relief as may be appropriate in the premises.

This the 26th day of May, 2010.

Respectfully submitted,

KENNETH MARK DRAIN and
STATE FARM FIRE AND CASUALTY COMPANY

By: s/E. Barney Robinson III (MSB #09432)
Robert C. Galloway (MSB # 4388)
Jeffrey A. Walker (MSB # 6879)
E. Barney Robinson III (MSB #09432)
Benjamin M. Watson (MSB #100078)
Amanda B. Barbour (MSB # 99119)
THEIR ATTORNEYS

² (E-mails from C. McGraw to A. Matteis with transcripts, Exs. 12-18 to Mtn.) State Farm has made only the transmittal e-mails exhibits to its motion and has not attached the entire transcripts, as the fact of their tender to the Rigsbys is not in dispute and the transcripts are voluminous.

³ As Drain resides in San Angelo, Texas, under Fed. R. Civ. P. 45(a)(2)(B), the subpoena should have issued from the district embracing that Texas city, instead of the instant Court. However, because Drain's counsel agreed to accept service of the subpoena via e-mail in Mississippi, neither State Farm nor Drain are challenging the fact that the subpoena issued from this Court, instead of a Texas district court.

OF COUNSEL:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
Post Office Drawer 4248
Gulfport, MS 39502
(P)(228) 575-3019
(E) bob.galloway@butlersnow.com

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
200 Renaissance at Colony Park, Suite 1400
1020 Highland Colony Parkway (39157)
Post Office Box 6010
Ridgeland, MS 39158-6010
(P) (601) 948-5711
(F) (601) 985-4500
(E) jeff.walker@butlersnow.com
(E) barney.robinson@butlersnow.com
(E) ben.watson@butlersnow.com
(E) amanda.barbour@butlersnow.com

Michael B. Beers (ASB-4992-S80M), PHV
BEERS, ANDERSON, JACKSON, PATTY & FAWAL, P.C.
Post Office Box 1988
Suite 100
250 Commerce Street (36104)
Montgomery, Alabama 36102
(P) (334) 834-5311
(F) (334) 834-5362
(E) mbeers@beersanderson.com

PRO HAC VICE

James R. Robie (CA State Bar # 67303), PHV
ROBIE & MATTHAI
Suite 1500
Biltmore Tower
500 South Grand Avenue
Los Angeles, California 90071
(P) (213) 706-8000
(F) (213) 706-9913
(E) jrobie@romalaw.com

PRO HAC VICE

CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for State Farm Fire and Casualty Company and Kenneth Mark Drain, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following via the means directed by the Court's CM/ECF System:

C. Maison Heidelberg
Ginny Y. Kennedy
MAISON HEIDELBERG P.A.
795 Woodlands Parkway, Suite 220
Ridgeland, MS 39157
(P) (601) 351-3333
(F) (601) 956-2090
maison@heidlebergpa.com
ginny@heidelbergpa.com

Scott D. Gilbert
August J. Matteis, Jr.
Craig J. Litherland
Benjamin R. Davidson
GILBERT LLP
11 New York Avenue, NW
Suite 700
Washington, DC 20005
gilberts@gotofirm.com
matteisa@gotofirm.com
litherlandc@gotofirm.com
davidsonb@gotofirm.com

COUNSEL FOR CORI RIGSBY AND KERRI RIGSBY

Jeffrey S. Bucholtz
Joyce R. Branda
Patricia R. Davis
Jay D. Majors
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
P.O. Box 261
Ben Franklin Station
Washington, DC 20044
(P) (202) 307-0264
(F) (202) 514-0280

Stan Harris
Alfred B. Jernigan, Jr.
Felicia C. Adams
UNITED STATES ATTORNEY'S OFFICE
Southern District of Mississippi
Suite 500
188 East Capitol Street
Jackson, MS 39201
(P) (601) 965-4480
(F) (601) 965-4409
(E) felicia.adams@usdoj.gov

ATTORNEYS FOR THE UNITED STATES

Larry G. Canada
Kathryn Breard Platt
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
701 Poydras Street
Suite 4040
New Orleans, LA 70139
(P) (504) 525-6802
(F) (504) 525-2456
lcanada@gjtbs.com
kplatt@gjtbs.com

ATTORNEYS FOR HAAG ENGINEERING CO.

Robert D. Gholson
Daniel D. Wallace
GHOLSON, BURSON, ENTREKIN & ORR, P.A.
535 North 5th Avenue (39440)
P.O. Box 1289
Laurel, MS 39441-1289
(P) (601) 649-4440
(F) (601) 649-4441
gholson@gbeolaw.com
wallace@gbeolaw.com

ATTORNEYS FOR FORENSIC ANALYSIS ENGINEERING CORPORATION

THIS the 26th day of May, 2010.

By: s/E. Barney Robinson III (MSB #09432)
E. Barney Robinson III (MSB #09432)